Filed Sept. 30, 1908.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 167.

PAUL G. WEBER, PLAINTIFF IN ERROR,

vs.

CHARLES ROGAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

MOTION TO DISMISS WRIT OF ERROR AND AFFIRM, WITH BRIEF AND ARGUMENT.

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 107.

PAUL O. WEBER, PLAINTIFF IN ERROR,

vs.

CHARLES ROGAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM, WITH BRIEF AND ARGUMENT.

Comes now Charles Rogan, Commissioner of the General Land Office of the State of Texas, defendant in error, by his counsel appearing here for him in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree from which said writ of error purports to have been sued out is a judgment or decree of the Supreme Court of one of the United States, towit: the Supreme Court of Texas, and there is no question involved herein that would authorize the exercise of the appellate jurisdiction of this court.

And the said defendant in error, by counsel aforesaid, also moves the court to affirm said judgment or decree from which said writ of error purports to have been sued out, because, although the record in said cause may show that this court has jurisdiction in the premises, yet it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

C. K. BELL,
Attorney General of the State of Texas,
Counsel for Chas. Rogan, Commissioner General Land Office, Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1902.

No. 107.

To Mr. M. E. Kleberg, Counsel for Paul O. Weber, Plaintiff in Error:

Please take notice that on Monday, the 13th day of October, 1902, at the opening of the court, or as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States, for the decision of said court thereon. Affixed hereto is a copy of the brief and argument to be submitted with the said motion in support thereof.

C. K. BELL,
Attorney General of the State of Texas,
Counsel for Chas. Rogan, Commissioner General Land Office, Defendant in Error.

STATEMENT FROM THE PRINTED RECORD.

Plaintiff in error, Paul O. Weber, instituted this proceeding in the Supreme Court of the State of Texas against Charles Rogan, Commissioner of the General Land Office of said State, defendant in error, to compel him, by writ of mandamus, to accept applications made to him by plaintiff in error to purchase certain of the public school lands of the State, and to award to him the said lands, said applications and awards having been rejected and refused by the Land Commissioner. The applications of the plaintiff in error are alleged in his original petition, from which it appears that the lands sought to be purchased were isolated and detached and situated in counties organized since January 1, 1875, other than Pecos, Presidio and El Paso, and consisted of one section, which, at the time of the application to purchase, was classified as timbered land, and one-half section which was at the time of the application classified as grazing land. It further appears from the petition that the Land Commissioner refused to accept the application and to award plaintiff in error the land for the reasons, as alleged in the petition:

"That the said two sections so applied for to be purchased by your petitioner have heretofore been classified by the Commissioner of the General Land Office,—the first as timbered land, and the second as grazing land, and that the law is not applicable to sections of grazing and timbered land, but that all sections of land and fractions of sections in this State that are either classed as grazing or timber sections can not be purchased under the law in force at the date of your petitioner's application for one

dollar per acre, although such grazing and timber sections, or fractions of sections are isolated and detached from other public lands and are situated in counties organized prior to the first day of January, 1875 (other than El Paso, Presidio and Pecos counties), and that there was at the date of the filing of your petitioner's application no law in the State of Texas by and under which the Commissioner of the General Land Office could lawfully have awarded the two aforesaid sections of land to your petitioner at the price of one dollar per acre offered therefor by your petitioner." (Printed Record, pp. 1-3.)

It appears from certified copies of the applications attached to the petition that the reason given by the Commissioner for his refusal, as to the timbered section, was as follows:

"This application is rejected because applicant applies for same at $1.00 per acre, one-fortieth cash and executing his obligation for thirty-nine-fortieths of same.

"This land, under Act of 1887, was classified as pine timber and valued at $8.00 per acre, and that being the classification and valuation on the date of the filing of this application a sale at $1.00 is declined." (Record, p. 8.)

And as to the grazing one-half section, was as follows:

"This land was sold to McHenry Winburn May 11, 1897, on the classification and valuation made under the Act of 1887, which was watered grazing land, valued at $2.50 per acre. Said sale was forfeited for non-payment of interest July 20, 1899, and this department, on September 1, 1899, placed this land

on market as grazing land, valued at $2.00. This application must be rejected for two reasons:

"1st. At the date of filing this application, August 11, 1899, this land was not on market, and an application to purchase must date after land is placed on the market.

"2nd. This land is classified as grazing land and valued at $2.00 per acre, hence the application at one dollar is declined." (Record, p. 11.)

Respondent (defendant in error) in said cause answered by special exceptions, in substance, (1) that the statute under which the relator (plaintiff in error) sought to purchase said lands related to agricultural lands only, and (2) that said statute did not confer upon relator the absolute right to buy the land, but provided that the land "may be sold," etc., thus giving the Commissioner a discretion as to whether he would sell the same as detached lands, etc. Respondent, answering to the facts, alleged that one section was classified as timbered land and valued at $8.00 per acre, which was its fair and reasonable value at the time of the application, and that the half section was at that time classified as grazing land and valued at $2.00 per acre, which was its fair and reasonable value. (Record, pp. 4-7.)

The law under which plaintiff in error made his applications is Article 4218y, Revised Civil Statutes of 1895, as amended in 1897, and is as follows:

"The Commissioner of the General Land Office may withold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settle-

ment, and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter." (Acts 1897, p. 184.)

The Supreme Court of Texas, upon the first submission of the cause, granted the writ of mandamus (Record, pp. 12-17), but a rehearing having been granted on application of the State, upon the second submission, refused the writ upon the ground, in substance, that as to the timbered section; if the statute referred to embraced timbered land; to entitle relator to purchase, under that statute, the section of timbered land as an isolated and detached section, he was required to pay into the treasury of the State, at the time of the filing of his application, the entire purchase price in cash, which he had not done, and that as to both the timbered section and the grazing half section, the word "*may*," in Article 4218y, of the Revised Statutes, ought to be construed in its literal sense, that is to say, as a word merely conferring a power upon the Commissioner to sell the lands therein specified at $1.00 per acre, and not as making it obligatory upon him to do so. The court further held in the opinion, though the decision does not seem to have expressly rested upon such holding, that the statute in question did not embrace, nor apply to, timbered lands. (Record, pp. 21-24.)

It will be seen from the foregoing statement, taken from the printed record of the cause, that no question of the violation of a contract was presented in the cause, and certainly no question as to whether any law of the State of Texas, having any relation to this case, impaired the obligation of a contract within the meaning of Article 1, Section 10, of the Constitution of the United States. The State of Texas had enacted certain laws regulating the sale of her public domain, and the only question presented by the pleading in this case, or the decision of the court, was as to whether the relator, under those laws, had such an absolute right to purchase the lands in question upon the terms and conditions named in his applications, as set out in his petition, as left the Land Commissioner no discretion, but required him to accept the applications and to award relator the lands.

In the original application for the writ of error to this court, which was presented to, and allowed by, the honorable chief justice of the Supreme Court of Texas, the ground of the application is stated to be that by the judgment of said court there "was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the title, right, privilege and exemption severally set up or claimed under the said clause of said Constitution." (Record, p. 31.) Relator, in his petition to the Supreme Court of the State, claimed that under the statute in question he had a right to buy the lands described in his application for one dollar per acre, upon the terms of payment of one-fortieth

of the purchase money in cash and the balance in thirty-nine annual installments, with annual interest at 3 per cent., and that the Land Commissioner had no discretion to accept or reject his application, but was required to accept his application and award him the land. The Supreme Court held, construing the statute in connection with other provisions of law for the sale of public lands, and especially timbered lands, that by the use of the word "may" in the statute in question the Legislature intended not to command or to require the Commissioner of the General Land Office to sell the lands referred to at $1.00 per acre, but to authorize him to do so, leaving him the discretion to reject or to accept applications to buy at that price.

No Federal question is involved, nor has there been, by the construction placed upon the statute by the Supreme Court of the State, any impairment of the obligation of a contract between Weber and the State.

Caperton vs. Bowyer, 14 Wall., 216.

Steines vs. Franklin Co., 14 Wall., 15-20.

Louisiana Waterworks vs La. Sugar Co., 125 U. S., 29-38.

Dugger vs. Bocock, 104 U. S., 596-603.

The only question raised or decided in the State court was as to the construction of a statute of the State, towit: whether under Art. 4218y, Revised Statutes, the Commissioner had a discretion to sell, or to refuse to sell the lands referred to, upon relator's application.

Insurance Company vs. the Treasurer, 11 Wall., 204-208.

Yazoo & Miss. R. R. Co. vs. Adam, 180 U. S., 41-44-45.

It is not claimed by the plaintiff in error that there is in this case any question of a statute of the State which impairs the obligations of a contract. His claim in substance and effect is that the judgment of the State court impairs the obligation of what he claims to be a contract arising out of his applications to purchase the land under the statute in question; that his applications under that statute constituted a contract between the State and himself, and that the decision of the State court denying that he had an absolute right to purchase under the statute—that is, denying that his applications, in connection with the statute, constituted a contract between himself and the State, impaired the obligations of such contract, in violation of the provisions of the Federal Constitution prohibiting the passage by the State of any law impairing the obligations of contracts.

The sole question involved is a correct interpretation of a statute of a State,—Was Weber entitled, under the statute in question, to purchase the land embraced in his applications at the price and upon the terms stated therein, and was this an absolute right, which the Land Commissioner had no discretion to refuse him?

"What is the true interpretation of any statute passed by a State for a purpose specified, and what acts will be justified under the statute, are matters

which lie exclusively within the determination of the highest court of the State."

Aicardi vs. State, 19 Wall., 636.
Congdon vs. Goodman, 2 Black, 574.

"Where a party claims below wholly in virtue of the laws of the State, and the highest court of the State decides that under these laws the claimant has no case, no writ of error lies here."

Worthy vs. The Commissioners, 9 Wall., 611.
R. R. Company vs. McClure, 10 Wall., 511.

"This court cannot entertain jurisdiction of a case from a State court because the *judgment* of that court impairs, or fails to give effect to, a contract."

Knox vs. Exchange Bank, 12 Wall., 379.

"In order to come within the provisions of the Constitution of the United States, which declares that no State shall pass any law impairing the obligations of contracts, not only must the obligations of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State and not by a decision of its judicial department only."

Central Land Co. vs. Laidley, 159 U. S., 103, 109.

"In the case before us the proceedings were under the Louisiana law. And the opinion of the court, according to the practice of this State, is entered on the record, and sets forth the principles of law upon which the decision was made. And it appears that the decision turned upon the construction (not the validity) of the Act of Mississippi of 1840, and upon

a question of merely local law concerning the right by prescription claimed by the trustees. Nothing is said in relation to the constitutionality or validity of this act and the opinion clearly shows that no such question was raised or decided. The writ of error must, therefore, be dismissed for want of jurisdiction."

Grand Gulf R. R. & Banking Co. vs. Marshall, 12 Howard, 166-168.

There was no question of the repugnancy of the statute in question, or any statute of the State, to any provision of the Federal Constitution in this case.

"The appellate jurisdiction of this court upon writ of error to a State court, upon the ground that the obligation of a contract has been impaired, can be invoked only when an act of the Legislature alleged to be repugnant to the Constitution of the United States, has been decided by the State court to be valid, and not when an act admitted to be valid has been misconstrued by the court. * * * If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the State has erred in its construction."

Central Land Co. vs. Laidley, 159 U. S., 103, 109-110.

If there was a Federal question it was not raised and presented by the complaining party, and no

reference thereto is made until the motion for rehearing.

Smith vs. Hunter, 7 Howard, 740.

Grand Gulf R. R. & Banking Co. vs. Marshall, 12 Howard, 166.

Hamilton Co. vs. Mass, 6 Wall., 632.

Schuyler National Bank vs. Bollong, 150 U. S., 85-89.

Mallet vs. North Carolina, 181 U. S., 589, 600-601.

Eastern Bldg. Association vs Welling, 181 U. S., 47-48-49; and cases cited.

Turner vs. Richardson, 180 U. S., 87, 91-92.

Meyer vs. Richmond, 172 U. S., 82-92.

The allowance of the writ of error upon the ground stated in the application therefor is not conclusive to show that a Federal question was raised in the case.

Caperton vs. Bowyer, *supra.*

Powell vs. Brunswick County, 150 U. S., 439.

The Supreme Court of Texas, in deciding the case, construed the statute substantially as the Land Commissioner had done in rejecting Weber's applications. If the judgment of the Supreme Court in such construction was an impairment of the obligation of any contract which Weber may have had with the State in violation of the Federal Constitution, the action of the Land Commissioner was equally so, and rel. r's petition to the Supreme Court should have so stated. It is submitted that this brings this case within the rule announced in—

Winona & St. Peters Land Co. vs. Minn., 159 U. S., 540; and

Morrison vs. Watson, 154 U. S., 115.

The decision of the State court rests upon two propositions:

1. In view of the peculiar provisions of the statutes of the State with regard to the sale of timbered land, and of timber upon such lands, the provisions of the statute in question in this case (Art. 4218y, R. S.) were not intended to embrace, nor apply to, timbered lands.

2. The word "may" in said statute, in view of the provisions of the statutes generally with regard to the sale of public lands, was intended to authorize or permit, but not to require, the Commissioner of the General Land Office to sell isolated and detached sections of land at $1.00 per acre.

These points are not within the purview of Section 25 of the Federal Judiciary Act, and are broad enough to sustain the judgment.

Rector vs. Ashley, 6 Wall., 142-147.

This court must accept the meaning of the State enactments to be that found in them by the State courts. The State court found, that under the facts stated in the petition, and the statute under which the applications were made, there was no contract on the part of the State to sell the lands to relator upon these applications.

Louisville & Nashville R. R. Co. vs. Kentucky, 183 U. S., 503-8.

As a matter of propriety and right the decisions of the State courts as to what are the laws of the State is binding upon those of the United States.

Town of South Ottawa vs. Perkins, 94 U. S., 260-268.

It is respectfully submitted that the writ of error should be dismissed. If this court, however, should hold that it has jurisdiction, then it is submitted that the judgment of the Supreme Court of Texas should be affirmed, without further argument, as prayed for in this motion.

C. K. BELL,
Attorney General of the State of Texas,
Counsel for Chas. Rogan, Commissioner General Land Office, Defendant in Error.